

UNITED STATES OF AMERICA,)	NO.	CR-09-2110-WFN-2
)		CR-09-2110-WFN-4
Plaintiff,)		CR-09-2110-WFN-6
)		CR-09-2110-WFN-10
-vs-)		CR-09-2110-WFN-12
)		CR-09-2110-WFN-13
DELORES ANN SMARTLOWIT (2),)		CR-09-2110-WFN-14
TAMMY LEE WEBSTER (4),)		CR-09-2110-WFN-16
BRUCE LEROY FLOYD (6),)		
PATSY RAE FLOYD (10),)		
TERRI JEAN LOWRIE (12),)		
TONY LEE KISER (13),)		
SHAWN DAVID COLLINS (14), and)	ORDER	
MARY EMILY BALDERAS (16),)		
)		
Defendants.)		

Defendant Name	and	No.	C	I	Counsel
Delores Ann Smartlowit		(2)			Michael Lynch
Tammy Lee Webster		(4)			Alfred Schweppe
Bruce Leroy Floyd		(6)			Bryan Whitaker
Patsy Rae Floyd		(10)			Troy Lee
Terri Jean Lowrie		(12)	X		Blaine Connoughton
Tony Lee Kiser		(13)			Gregory Scott

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Defendant Name	and	No.	C	I	Counsel
Shawn David Collins		(14)	X		Richard Smith
Mary Emily Balderas		(16)	X		Brian Sanderson

The Court addressed Defendants' Motions to Dismiss. This Order only addresses double jeopardy issues, the other issues raised were addressed in a separate Order. At the time of the hearing, the Court addressed the Government's Motion to Dismiss (Ct. Rec. 268). The Court entered an order dismissing Ms. Smartlowit, so she and Mr. Lynch were excused and her Motion is moot. The Court suggested beginning with discussing the Motions of Ms. Balderas, Mr. Collins, and Ms. Lowrie. The Government candidly acknowledged that Ms. Floyd and Mr. Kiser were similarly situated.

The Court has reviewed the file, Motions, and considered oral argument and is fully informed. This Order is entered to memorialize and supplement the oral rulings of the Court.

I. Background

Though double jeopardy issues are individual specific, several Defendants have similar facts supporting their motions. Each Defendant is currently charged with Conspiracy to Distribute over 1,000 kg of marijuana in Count One of the Indictment. All Defendants except Mr. Floyd, and Ms. Webster have previously been charged with conspiracy to possess with intent to distribute marijuana. All Defendants except Ms. Webster and Mr. Floyd entered into plea agreements pleading to conspiracy to import marijuana in the Western District of Texas. Each of those Defendants entered into plea agreements wherein the Government agreed that in exchange for their guilty pleas, the Government would move for dismissal of the remaining counts of the Indictment currently pending against the Defendant at the time of sentencing. The Government apparently followed through on the deals, as the judgments in each of those Defendants' cases reflects that the counts were dismissed. Each

1 of the overt acts described in the current Indictment describes the acts that Defendants
2 already pled guilty to, albeit, on slightly different charges.

3 Mary Balderas, Shawn Collins, Terri Lowrie, Patsy Floyd, and Tony Kiser each
4 entered into nearly identical plea agreements. The plea agreements read, "The Defendant,
5 [DEFENDANT'S NAME], agrees to plead guilty to Count one of the Indictment In
6 exchange, the Government agrees to move for dismissal of the remaining count(s) of the
7 Indictment currently pending against the Defendant at time of sentencing." The defendant
8 waives appeal "up to the maximum allowed by statute" and waives filing a § 2255 in
9 exchange for concessions made by the Government. In a section entitled "Reservation of the
10 Government's Rights," the Government retains the right to present facts to the probation
11 office for the PSR and dispute sentencing factors.

12 II. ANALYSIS

13 The Double Jeopardy clause "guarantees that the State shall not be permitted to make
14 repeated attempts to convict the accused, thereby subjecting him to embarrassment, expense
15 and ordeal and compelling him to live in a continuing state of anxiety and insecurity"
16 *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977) (internal citation
17 omitted). A defendant may be charged under multiple statutes so long as each charge
18 requires proof of an independent fact without running afoul of double jeopardy. *Blockburger*
19 *v. United States*, 284 U.S. 299 (1932). "The [Double Jeopardy] Clause prohibits the
20 government from splitting a single conspiracy into separate charges and bringing successive
21 prosecutions against a defendant." *United States v. Ziskin*, 360 F.3d 934, 943 (9th Cir. 2003).
22 The Government may charge two separate conspiracy counts where those conspiracies rely
23 on different statutes even where the underlying agreement is the same for both conspiracies.
24 *United States v. Arlt*, 252 F.3d 1032, 1035 (9th Cir. 2001).

25 "To determine whether two conspiracy counts charge the same offence and so place
26 the defendant in double jeopardy, we consider five factors: (1) the differences in the periods

1 of time covered by the alleged conspiracies; (2) the places where the conspiracies were
2 alleged to occur; (3) the persons charged as co-conspirators; (4) the overt acts alleged to have
3 been committed; and (5) the statutes alleged to have been violated. Rather than focus on any
4 one factor, the court considers all the factors together to determine if there was more than one
5 agreement." *United States v. Smith*, 424 F.3d 992, 1000 (9th Cir. 2005)(citing *United States*
6 *v. Stoddard*, 111 F.3d,1450, 1454 (9th Cir. 1997).

7 For the defendants lacking a prior conspiracy charge, Mr. Floyd and Ms. Webster,
8 there is no double jeopardy violation because their prior charges were under different
9 statutes. They have been charged under separate states requires proof of different facts. Their
10 double jeopardy Motions must be dismissed.

11 As to the remaining Defendants, the Government argues that either (1) the prior
12 dismissed counts were dismissed without prejudice so can be brought again, or (2) even if
13 the prior dismissed counts were dismissed with prejudice, since the prior Indictments
14 charged a conspiracy for possession with intent to distribute and the current Indictment
15 charges a conspiracy to distribute the two conspiracies rely on separate statutes and thus
16 can be charged separately. The Government's first argument is misplaced. Reading the
17 prior plea agreements in conjunction with the judgment undermines the Governments
18 assertion that the dismissed counts on the prior indictments were dismissed without
19 prejudice. The only major concession by the government was the dismissal of counts. To
20 interpret that concession as a dismissal without prejudice would eviscerate any real benefit
21 derived by the defendant for entering into the plea agreement. The fact that the judgments
22 fail to state "with prejudice" does not aid the Government's argument. The judgment is a
23 standard form that court staff completes by filing in blanks and checking boxes. Though
24 there is space to indicate that counts are dismissed on the motion of the Government,
25 there is no place to state that the dismissal is with or without prejudice. To assume that
26 the dismissals are without prejudice because there is no statement as to whether or not

1 prejudice applies would be assume that the court intended to undermine the spirit of the
2 parties' plea agreement.

3 The Government's second argument is equally unconvincing. The current conspiracy
4 is charged under 18 U.S.C. §841(a)(1) and 18 U.S.C. §846. The Defendants' prior
5 conspiracies were charged under the exact same statutes and sections. The statutes
6 underlying both conspiracies are identical and, as candidly acknowledged by the
7 Government, rely on the same agreement.

8 Aside from the argument regarding the underlying statute, the Government
9 acknowledged the conspiracies charged for each Defendant were identical to their prior
10 charge, so the Court need not examine the factors listed above. Thus, the Court concludes
11 that the current Indictment violates Defendants Patsy Rae Floyd, Tony Lee Kiser, Shawn
12 Collins, Terry Jean Lowrie, and Mary Emily Balderas's constitutional guarantee against
13 double jeopardy. Accordingly,

14 **IT IS ORDERED** that:

15 1. Defendant Balderas's Motion to Dismiss, filed February 13, 2010 , **Ct. Rec. 203**,
16 is **GRANTED**.

17 2. Defendant Collins's Motion to Dismiss, filed February 16, 2010, **Ct. Rec. 208**, is
18 **GRANTED**.

19 3. Defendant Lowrie's Motion to Dismiss, filed February 18, 2010, **Ct. Rec. 211**, is
20 **GRANTED**.

21 4. Defendant Kiser's Motion to Dismiss on Double Jeopardy Grounds, filed March 8,
22 2010, **Ct. Rec. 226**, is **GRANTED**.

23 5. Defendant Kiser's Motion to Dismiss for Multiplicity, filed March 17, 2010, **Ct.**
24 **Rec. 251**, is **DENIED AS MOOT**.

25 6. Defendant Patsy Floyd's Motion to Dismiss, filed March 8, 2010, **Ct. Rec. 231**, is
26 **GRANTED**.

- (a) PATSY RAE FLOYD (10),
- (b) TERRI JEAN LOWRIE (12),
- (c) TONY LEE KISER (13),
- (d) SHAWN DAVID COLLINS (14), and
- (e) MARY EMILY BALDERAS (16),

The District Court Executive is directed to file this Order and provide copies to counsel.

DATED this 25th day of March, 2010.

s/ Wm. Fremming Nielsen
WM. FREMMING NIELSEN
SENIOR UNITED STATES DISTRICT JUDGE